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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Presentation in WT Docket No. 12-70, *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*; ET Docket No. 10-142, *Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz*; and WT Docket No. 04-356, *Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands*

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, DISH Network Corporation ("DISH") submits this letter addressing certain legal issues presented by the Commission's apparent desire to give preference to potential future H Block operations over MSS/AWS-4 operations. In doing so, DISH responds to the consistent advocacy of Sprint Nextel Corporation ("Sprint") that the Commission should prejudice service rules for the H Block in the AWS-4 proceeding.¹ In particular, Sprint claims that the H Block—and high-power service in the H Block in particular—should be given priority over the AWS-4 band. For the reasons set forth below, among others, DISH respectfully believes that the Commission's desire and Sprint's proposal are legally flawed.²

The Spectrum Act. To begin with, the Middle Class Tax Relief and Job Creation Act of 2012 (the "Spectrum Act") does not require this action. The Spectrum Act simply requires an auction of the H Block if the spectrum can "be used without causing harmful interference to commercial

¹ See Letter from Marc S. Martin, Counsel for Sprint, to Marlene H. Dortch, Secretary, FCC, WT Dkt. Nos. 12-70 and 04-356 and ET Dkt. No. 10-142 (Nov. 2, 2012) ("Sprint November 2 Letter"); Letter from Marc S. Martin, Counsel for Sprint, to Marlene H. Dortch, Secretary, FCC, WT Dkt. Nos. 12-70 and 04-356 and ET Dkt. No. 10-142 (Oct. 31, 2012) ("Sprint October 31 Letter").

² DISH has already detailed elsewhere the technical flaws of Sprint's proposal. See, e.g., Letter from Jeffrey H. Blum, DISH Network Corporation, to Marlene H. Dortch, Secretary, FCC, WT Dkt. Nos. 12-70 and 04-356 and ET Dkt. No. 10-142 (Oct. 17, 2012); Letter from Jeffrey H. Blum, DISH Network Corporation, to Marlene H. Dortch, Secretary, FCC, WT Dkt. Nos. 12-70 and 04-356 and ET Dkt. No. 10-142 (Oct. 11, 2012); Letter from Jeffrey H. Blum, DISH Network Corporation, to Marlene H. Dortch, Secretary, FCC, WT Dkt. Nos. 12-70 and 04-356 and ET Dkt. No. 10-142 (Sept. 24, 2012).

mobile service licensees in the frequencies between 1930 megahertz and 1995 megahertz.”³ This in no way suggests, let alone requires, that MSS/AWS-4 services should be secondary to, or accept harmful interference from, possible future H Block operations.

Indeed, neither Section 6401(b) nor any other provision of the Spectrum Act prescribes, or limits the Commission’s existing authority to develop, service rules that may be required to protect non-PCS services (such as MSS/AWS-4) from harmful interference *from* the H Block.⁴ Rather, the Spectrum Act merely specifies an explicit condition (*i.e.*, an interference determination by the Commission) that would preclude an H Block auction. If anything, the fact that this condition applies only to the H Block reflects a lesser Congressional commitment to auction the H Block than other identified blocks.

Adoption of MSS/AWS-4 rules as originally proposed in this proceeding would not prevent the Commission from auctioning the H Block, when and if the Spectrum Act’s condition is met. Nothing in the Spectrum Act requires that the H Block be auctioned for high-power services. As DISH and others have explained, the H Block can be used for a number of other auctionable purposes, including small cell deployments.⁵ As data usage continues to explode, small cell deployments are an increasingly popular and effective method to increase the capacity of data networks.⁶ Moreover, given the opposition of other parties to high-power rules for the H Block, and the fact that Sprint is likely to be the only other readily identifiable bidder for the H Block, the Commission has no rational basis for concluding that high-power H Block would be superior.⁷

³ Pub. L. No. 112-96, § 6401(b)(4), 126 Stat. 156, 223 (2012).

⁴ See 47 U.S.C. § 303(f) (“the Commission ... shall ... [m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations”).

⁵ See Letter from Jeffrey H. Blum, DISH Network Corporation, to Marlene H. Dortch, Secretary, FCC, WT Dkt. Nos. 12-70 and 04-356 and ET Dkt. No. 10-142, at 5-6 (Oct. 17, 2012); Letter from Catherine R. Sloan, Computer & Communications Industry Association, to Marlene H. Dortch, Secretary, FCC, WT Dkt. Nos. 12-70 and 04-356 and ET Dkt. No. 10-142, at 1 (Oct. 23, 2012).

⁶ See Caroline Gabriel, *Telecom Operator Strategies for Profitable Small Cell Networks*, Telecom Lead, (Sept. 28, 2012), available at <http://telecomlead.com/contributed/telecom-operator-strategies-for-profitable-small-cell-networks/> (“*Telecom Operator Strategies for Profitable Small Cell Networks*”); Maravedis-Rethink, *Small Cells Will Unlock the Value of Underused Spectrum: Carriers Look for Fivefold Capacity Increase Without New Airwaves* (Sept. 2012), available at <http://archive.constantcontact.com/fs096/1103610692385/archive/1111033023790.html>.

⁷ See Letter from Joan Marsh, Vice President – Federal Regulatory, AT&T, Inc. to Marlene H. Dortch, Secretary, FCC, WT Dkt. Nos. 12-70 and 04-356 and ET Dkt. No. 10-142, at 3 (Oct. 5, 2012) (noting that “[b]ecause of the serious interference concerns and the significant operational challenges involved, the H Block should not be used for commercial mobile service”); Letter from Michael Calabrese, New America Foundation, to Marlene H. Dortch, Secretary, FCC, WT Dkt. Nos. 12-70, 04-356, ET Dkt. No. 10-142, at 3 (Nov. 7, 2012); Letter from Jeffrey H. Blum, DISH Network Corporation, to Marlene H. Dortch, Secretary, FCC, WT Dkt. Nos. 12-70 and 04-356 and ET Dkt. No. 10-142, at 5-6 (Oct. 17, 2012).

The adoption of rules requiring new H Block licensees to accommodate MSS/AWS-4 services would, in fact, be fully consistent with Commission precedent and policy. Under the Commission's established "first-in-time" policy, existing co-primary licensees are not required to modify their operations to prevent interference to (and, in fact, are entitled to interference protection from) new entrants.⁸ Viewed as "the mainstay of interference protection" for many wireless services,⁹ the "first-in-time" policy has long governed the sharing of spectrum by co-primary services.¹⁰ The Commission thus should apply its "first-in-time" policy to grant MSS/AWS-4 services the full rights proposed in the NPRM and then address future H Block operations as part of a comprehensive order after a full rulemaking proceeding.¹¹

Section 309(j). The Commission also should reject Sprint's suggestion that auction revenues should dictate the Commission's public interest determinations of whether and how to auction the H Block¹² because doing so would be unlawful.¹³

⁸ See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for Narrowband Private Land Mobile Radio Channels in the 05-150.8 MHz, 162-174 MHz, and 406.1-420 MHz Bands That Are Allocated for Federal Government Use, *Report and Order*, 20 FCC Rcd 5793 ¶ 32 (2005) ("Our approach preserves our traditional first-in-time policy by which the first licensed entity does not have to modify its operations but instead maintains a primary status in relation to subsequently licensed entities. Under this policy, an existing ... operation is entitled to protection from interference from new ... licensees that subsequently begin operations in the band, and will not need to modify existing operations to prevent interference to these new entrants."); Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, *Second Report and Order and Second Memorandum Opinion and Order*, 15 FCC Rcd 12315 ¶ 133 (2000) ("Under our first-in-time rule, the first co-primary licensee is entitled to protection from harmful interference by subsequent licensees. As the subsequent licensees, MSS licensees have the option of sharing spectrum with BAS and FS microwave licensees, provided that they do not cause harmful interference to the incumbents.").

⁹ See Deployment of Wireline Services Offering Advanced Telecommunications Capability, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order in CC Docket No. 98-147 Fourth Report and Order in CC Docket No. 96-98*, 14 FCC Rcd 20912 ¶ 211 (1999).

¹⁰ See, e.g., Sudbrink Broadcasting of Georgia, Inc., *Memorandum Opinion and Order*, 65 F.C.C.2d 691 ¶ 5 (1977), citing *Midnight Sun Broadcasting Co.*, 3 R.R. 1751 (1947); *B&W Truck Service*, 15 F.C.C.2d 769 (1968) ("It is clear that the 'newcomer' is responsible, financially and otherwise, for taking whatever steps may be necessary to eliminate objectionable interference.").

¹¹ DISH's AWS-4 facilities are expected to be licensed and deployed prior to H Block deployment, subject to the outcome of this proceeding. In any event, new H block licensees should be required under the Commission's "first-in-time" policy to provide interference protection to previously licensed ancillary terrestrial component systems, and this protection should be extended to technically similar AWS-4 facilities.

¹² See Sprint November 2 Letter at 2 (Sprint "likely would not bid on the H Block if it were restricted to small cell use or air-to-ground communications"); Sprint October 31 Letter at 2 ("DISH's proposed H Block restriction would significantly reduce the H Block's value in an auction" and "would thwart Congress's intent to have the H Block auction contribute significantly to funding the build-out of a new public safety network").

¹³ 47 U.S.C. § 309(j)(7)(A).

Section 309(j)(7) of the Communications Act explicitly prohibits and limits “[c]onsideration of revenues in public interest determinations.”¹⁴ As the Second Circuit Court of Appeals has explained, “Section 309(j)(7)(A) specifically limits the degree to which the FCC can designate the generation of revenue as a factor in the ‘public interest,’ demonstrating Congress’s intent that satisfaction of the [Communications Act’s] objectives not be equated with income maximization.”¹⁵ The Commission has further explained that its “statutory authority continues to instruct that the agency not base spectrum allocation decisions ‘solely or predominantly’ on the expectation of revenues that auctions may generate.”¹⁶

Thus, at a minimum, the Commission cannot be driven solely by a desire to maximize future H Block auction revenues in the future H Block rulemaking proceeding, or in how it finalizes the AWS-4 technical rules in relation to possible future H Block services. Sprint offers no explanation as to how its demands possibly align with the statute’s clear language that the auction process “does not amount to maximizing revenue,” or as the Commission itself has made clear, “nor is it [the Commission’s] sole objective.”¹⁷ In establishing Section 309, Congress stressed that “important communications policy objectives should not be sacrificed in the interest of maximizing revenues...”¹⁸ The Commission subsequently explained that those goals, among others, “are to encourage the rapid deployment of service, [and] efficient use of the spectrum.”¹⁹ Consideration of those goals clearly weighs in favor of maintaining the proposed AWS-4 technical rules and ensuring that potential future H Block operations can co-exist with AWS-4 and PCS services. DISH’s ability to launch the nation’s first LTE-Advanced network as expeditiously as possible is heavily dependent upon the Commission’s rejection of Sprint’s anti-competitive overreach. Similarly, Sprint’s desired outcome is spectrally inefficient as it would potentially deprive U.S. consumers of the ability to receive mobile broadband services from all of H Block and AWS-4 band.

Regardless, even if the Commission were permitted to consider auction revenues, it is not apparent that Sprint’s demands for the H Block auction would necessarily raise any more revenues than the more holistic approach supported by DISH. DISH is confident that a successful auction of the H Block is readily achievable alongside a successful and fully utilized AWS-4 band.

¹⁴ *Id.* § 309(j)(7)(A)-(B).

¹⁵ *In re Nextwave Personal Communications*, 200 F.3d 43, 52 n.7 (2d. Cir. 1999).

¹⁶ See FCC Report to Congress on Spectrum Auctions, *Report*, FCC 97-353, at 27 (1997). See also Implementation of Section 309(j) of the Communications Act--Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348 ¶ 73 (1994) (“1994 Order”) (“While Congress has charged [the FCC] to recover a portion of the value of the public spectrum made available via competitive bidding, this does not amount to maximizing revenue, nor is it [the FCC’s] sole objective.”).

¹⁷ See 1994 Order ¶ 73.

¹⁸ H.R. Rep. No. 111, 103d Congr., 1st Sess. 258 (1993).

¹⁹ See 1994 Order ¶ 73.

